No. 01-734

In The

Supreme Court of the United States

WASHINGTON STATE MEDICAL
QUALITY ASSURANCE COMMISSION,

Petitioner,

v.

BANG DUY NGUYEN, M.D.,

Respondent.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Washington

RESPONDENT'S BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI

RALPH A. ALFIERI, WSBA 496
Attorney of Record
for the Respondent
211-Fourteenth Avenue East
Seattle, WA 98112-5299
206-324-7117

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

15 pp

QUESTION PRESENTED

Every state licenses physicians to practice medicine and imposes sanctions for violating standards of professional conduct, which may include revocation of the license. Thirty states have chosen preponderance of the evidence as the burden of proof, necessary to establish a violation. The State of Washington, as one of those thirty states had also chosen the preponderance rule.

> Does the Due Process Clause of the Fourteenth Amendment require the state of Washington to apply the clear and convincing evidence standard of proof to revoke a license to practice medicine instead of the preponderance of the evidence standard?

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Bang Duy Nguyen M.D., the respondent respectfully opposes the granting of a Petition for Writ of Certiorari in this case.

OPINIONS BELOW

The Respondent agrees with the statement of the Petitioner setting forth the account of the Opinions rendered below.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Respondent agrees that the Petitioner has listed the Laws of the State of Washington and that they are set out in the Petitioner's appendix.

RESPONDENT'S COUNTER STATEMENT

The Respondent's Counter Statement begins with this question: What dangers has the Petitioner demonstrated will result from application of due process principles as defined by the Washington Supreme Court decision? The answer is: None.

What is the effect of the Washington State Supreme Court's decision in this case? The answer is: "The institution of the government exercising its power through an administrative agency will have to use more care when prosecuting its citizens."

Regardless of the assertion of the Petitioner that every state in the United States licenses the practice of medicine and disciplines physicians for violating standards of professional conduct, it does not follow that the States are free to ignore the requirements of the Constitution of the United States or their own State Constitutions in either passing, implementing or enforcing their own laws.

In the State of Washington, as pointed out by the Petitioner in its Brief, the State of Washington enacted and relies upon, the Washington *Administrative Procedures Act*, Wash. Rev. Code 34.05 herein after referred to as the APA. In deciding Dr. Nguyen's case, the majority opinion, at Page 520, cited this APA for the proposition that the Washington State Supreme Court was given the authority by the Washington State Legislature to: "*grant relief from an Administrative agency's ruling if, among other things, the order is in violation of the constitution either on its face or as applied.* RCW 34.05.570(3)"

In this case the Washington State Supreme Court made such a decision pursuant to the APA.

It is also under this same APA that virtually any information can be used as evidence in physician disciplinary proceedings including second and third hand hearsay.

The Washington State Supreme Court made no error. It correctly followed the law set forth in *Addington v. Texas*, 441 U.S. 418, 423, 99 S. Ct. 1804, 60 L. Ed.2d 323 (1979), *Mathews v. Eldridge*, 424 U.S. 319 (1976), cited in the Petitioner's Brief, as well as *Painter v. Abels*, 998 P.2d 931, 940 (Wyo. 2000); *Johnson v. Board of Governors of Registered Dentists*, 913 P.2d 1339 (Okla. 1996); *Washington Medical Disciplinary Board v. Johnston*, 99 Wn. 2d 466, 474, 663 P.2d 457 (1983).

The Majority opinion in the Washington State Supreme Court in *Nguyen v. Dept of Health*, 144 Wn. 2d 516 (Aug. 2001), recognized that the structure of the procedures which were established by statute and written by the Washington State Legislature were intended to guaranty procedural due process.

The Majority opinion however also recognized that the failing was not in the statutory structures themselves but in the dynamic of the human thinking of the members of an Agency, in this case the Medical Quality Assurance Commission which is charged with the duty of investigating, policing, disciplining, prosecuting, punishing and imposing penalties upon physicians it decides are guilty of unprofessional conduct; more significantly, this is done after determining these physicians are guilty of unprofessional conduct based upon the rules, regulations, and procedures authored by the Medical Quality Assurance Commission in cooperation with the Department of Health.

The Washington State Supreme Court recognized that changing the burden of proof rule in these quasi criminal proceedings from a preponderance of the evidence rule to

clear and convincing evidence rule would cause members of the Medical Quality Assurance Commission to be appropriately careful in their decision making given the potentially disastrous ramifications of these decisions, including loss of reputation, money, life style and respect, profession, and standing in the community.

Failure to enforce the clear and convincing rule would leave governmental power dangerously unfettered and allowed to hide behind a smoke screen that there are adequate statutory provisions to preserve due process. To tolerate this would be akin to walking down the main street of a Hollywood western movies set, looking at the facades of the buildings on the set and making the assumption that these were all complete buildings.

Due process protections must be substantive and not illusory.

In the context of this case it is vital to focus on the following realities:

(1) The Medical Quality Assurance Commission, working with its investigative arm, the Department of Health decided what the rules of procedure would be, (2) what rules would be followed when reviewing the physicians' conduct, (3) what rules would be followed when these entities are acting as police and/or investigators; actions which at times are and were carried out covertly, (5) what facts are and were sufficient upon which to base charges of misconduct, (6) when a case should be prosecuted, (7) whether the evidence is sufficient for a conviction, (8) what punishment should be imposed, including fines, suspension or revocation of license.

The Commission and the Department of Health have the power to enter a physicians office and conduct a surprise search, regardless of whether he has patients present or not.

The Commission does have the power to issue penalties, both in the forms of suspension of license and fines.

In the State of Washington, our Supreme Court has now said to these agencies, after reviewing their rules, procedures, conduct of hearings, and the manner in which they analyze and process the specific evidence as in the instant case, that they need to be more careful in prosecuting physicians.

Since the agency is making the rules, is prosecuting and deciding the case, a low level burden of proof such as a simple preponderance is insufficient to tell the finder of facts it must exercise caution.

The lack of rules regarding admissibility of evidence in administrative cases results in and did result in this case in the State's being able to present any kind of information as evidence regardless of evidentiary quality to convict a physician. This is particularly true when this occurs in the context of a proceeding governed by a simple preponderance rule that is applied especially where there are virtually no rules of evidence.

Further, the Petitioner argues that to require clear and convincing evidence would be an impairment of the State of Washington's ability to act as policemen, prosecutor, judge, jury and executioner, but it shows no real or practical way that its ability to enforce the laws of physician discipline would be impaired.

If the Petitioner's arguments are to be accepted, that there should be one rule for the entire country, why not make it a clear and convincing rule? However, before coming to that, what does the petitioner want? Does it want, one rule for the entire country, and then have the federal government take over the licensing and the policing of physicians?

Regulation of the Practice of Medicine in Washington

The respondent agrees with the matters set forth in this section of the Petitioner's Brief.

Procedural History

The Respondent agrees in large part with the statement set forth in this section of the Petitioner's Brief, except for the sentence beginning at the bottom of Page 7 of the Petitioner's Brief where the Petitioner stated that CPEP determined that Dr. Nguyen practiced medicine in a manner that created an unreasonable risk that patients ***may*** be harmed.

This expression: ***"may be harmed,"*** underscores the likelihood of an unfair conviction based on speculation if the simple preponderance rule is allowed to stand.

This disagreed with the testimony and assessment of Dr. Peterson, the Petitioner's own hired expert who reviewed Dr. Nguyen's files and Dr. Burdick's assessment as Preceptor and Dr. Miller's conclusions about the fairness of the structure established to monitor Dr. Nguyen.

The Petitioner's assessment in the first paragraph of Page 11 of its Brief said that the Washington Supreme

Court majority reasoned that the procedural safeguards established by the Washington State Legislature could not substitute for failure to impose the requisite minimum burden of proof which is specifically designed to impress the fact finder with the importance of the decision and thereby reduce the chance of error.

All the statutorily created structures in the world that carry the label procedural safeguards mean nothing when applied by the unfettered collective errant mind of a body of human beings who are given the power of being police, prosecutor, judge, jury and executioner, who have had the opportunity to convince themselves of guilt before all the evidence is presented at a hearing.

To argue that a "simple preponderance rule" applies in all civil cases, and should therefore apply in physician discipline cases is specious. In the "usual" civil case, such as a personal injury case, medical malpractice case, real estate case, or contract case, the situation is entirely different.

In civil cases of these types, there is an attorney who presents the case for the plaintiff, there is the attorney for the defendant who defends and there are jurors under the guidance of jury instructions issued by the Judge who decide the factual issues and a Judge guided by the rules of evidence.

In the alternative, a bench trial is decided by the Judge who makes a determination. However, in neither scenario is the fact finder the prosecutor. The collector of the facts or evidence is also separate from the finder of fact and the judge and the investigator do not take part in the decision of the case.

This is particularly true in a jury case especially where the fact finder is neither prosecutor nor executioner.

The Petitioner's analysis beginning in the second paragraph of Page 11, of its Brief when quoting from the dissenting opinion with approval, fails to recognize that the result of a professional disciplinary proceeding is no longer simply an economic loss.

In addition to the economic loss and the loss of reputation and the loss of standing the physician suffers in his or her own community, the disciplined physician must now be listed in the National Data Bank which is available to all.

The Petitioner's Brief also pointed out at Page 12, that there are "procedural safeguards." These are additional façades which hide the absence of real due process.

This begs the question and makes for a bizarre scenario given the fact that hearings conducted under the APA allow virtually any information to become evidence.

RESPONDENT'S STATEMENT OF REASONS FOR NOT GRANTING PETITION

In its statement which began on Page 12 of its Brief, the Petitioner fails to set forth any reasons or explanations as to how the State would be impeded in prosecuting physicians for unprofessional conduct; rather it simply repeated the expression that the Washington State Supreme Court inflated a physicians interest in his or her

license into a liberty interest equivalent to a loss of liberty.

Requiring proof under the Clear and Convincing test does not impair the State. In the Majority opinion the Court discussed this thoroughly and the question as to how the State will be impaired in its disciplining of physicians if the Clear and Convincing Rule is used has never been answered by the State.

At the bottom of Page 12 of its Brief, the Petitioner argued that the State should have the freedom to develop a variety of solutions to problems and not be forced into a common mold.

The Petitioner wants that for the Washington State Medical Quality Assurance Commission and the Dept. of Health, but does not want that for the respective State Supreme Courts – this argument does not want to allow the State Supreme Courts in the respective States to be able to tell its own state agencies that they are violating the Constitution. This contravenes the *Addington* case *supra*.

The Petitioner wants unfettered plenary power to act unconstitutionally as it may so desire.

1. There is No Conflict Among the States over the Burden of Proof Required by the Due Process Clause In a Medical Disciplinary Proceeding.

The most likely answer in the other States using the clear and convincing standard is that their procedures do in fact appropriately safeguard due process. That is for each State Court to decide.

2. The Washington Supreme Court's Decision Does Not Conflict with the U.S. Supreme Court's Due Process Analysis of the Private Interest Involved.

Under this heading the Petitioner's Brief failed to recognize the essence of the Washington State Supreme Court's analysis that when dealing with matters which are not simply "civil" or not simply "criminal" but are "quasi-criminal" due process must have a different intensity in application and requires something different than either proof beyond a reasonable doubt or proof by a simple preponderance.

As the majority opinion pointed out, the impact of a decision of guilty must be examined. The impact in a physician discipline case is not simply a fine like in a traffic infraction, and at the other end of the scale it is not jail. However between these two poles is an impact of a different nature which the simple preponderance rule is not adequate to resolve in terms of due process.

3. The Washington Supreme Court's Decision Does Not Fail to Recognize the State's Substantial Interest In Protecting the Lives and Health of Its Citizens.

This is an argument designed to sell to the public by giving it an emotional appeal.

Those States which follow the Clear and Convincing rule for physicians seem not to have any enforcement problems, and the State of Washington is not impaired in its discipline of Attorneys when operating under the Clear and Convincing Rule.

4. The Petition Does Not Raise an Important National Question.

The Petitioner argued on Page 27, that to follow the clear and convincing rule is going to declare that twenty five jurisdictions are applying a constitutionally impermissible rule. This does not follow because there is no showing that due process is not satisfied by other means in those States such as better statutorily created procedural safeguards.

If the Constitution limits the states' freedom to act, who is better equipped to deal with that question than the Courts?

CONCLUSION

The Opinion of the Washington State Supreme Court, which the Petitioner seeks to have overturned, gives recognition to the need for flexibility in applying due process principles. It recognizes that between the two poles of proof by a simple preponderance and proof beyond a reasonable doubt there lies a body of cases, the facts of which, demand due process principles be applied in the form of a burden of proof by clear and convincing evidence. The Washington State Supreme Court has also provided the guidelines for determining what facts dictate when clear and convincing evidence must be presented by the prosecuting party.

Respectfully submitted,

RALPH A. ALFIERI, wsba 496
Attorney for the Respondent

211-Fourteenth Avenue East
Seattle, WA 98112-5299
206-324-7117

January 31, 2002